IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO. 2706 OF 2007

Nathuram Kamal Patil .... Petitioner

versus

Dinkar Dnyanoba Patil ..... Respondent.

Shri N.B.Shah i/b.Piyush Shah for the petitioner
Shri N.N. Patil for the respondent.

CORAM; A.P. DESHPANDE, J.
DATED; 2ND JULY, 2007

P.C.;

1. Rule. Rule made returnable forthwith. Taken up for final hearing by consent of parties.

2. The respondent herein is original plaintiff who instituted a suit for perpetual injunction seeking restraining the present petitioner/defendant from interfering with the use of the alleged approach lane of 3 feet width. The suit came to be dismissed by the trial court after recording a finding that the plaintiff has failed to establish that he used the said lane for access for his house bearing no. 284 and used the same since last many years. The trial court has held that the plaintiff has failed to establish and substantiate a right in regard to the approach lane. So holding the main issue has been

answered against the respondent. Besides answering issue no.1 against the respondent the trial court has also recorded a finding that the plaintiff has failed to even make an averment touching the direction of the land, its description, survey number, dominent heritage, servient heritage etc. It is further observed that the location of the house properties and the alleged approach lane over which easementary right is claimed is also not properly described. For very many defects which cannot be termed as defects of formal nature the suit came to be dismissed. Aggrieved by the judgment and decree passed by the trial court, the plaintiff instituted a regular civil appeal and the matter is pending before the learned Ad-hoc District Judge, Raigad, at Alibag. The respondent/plaintiff moved an application purportedly under order 23 of CPC, and sought permission to withdraw the suit with liberty to institute a fresh suit. The first appellate court has granted the application moved by the respondent and aggrieved thereby the present writ petition has been filed.

3. Perusal of Order 23 clearly reveals that if the court is satisfied that the suit must fail by reason of some formal defect or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit, it may, on such terms as it thinks fit,

grant the plaintiff the permission for withdrawal of such suit. The learned counsel for the petitioner placing reliance on a full bench judgment of this court reported in **AIR 1940 Bom. 121** has submitted that clause (a) of Order 23, Rule 1 (3) is illustrative of the grounds referred to in clause (b) and although the grounds need not be egesdem generis with the ground mentioned in clause (a), they must be "atleast analogous" to it. The defect noticed by the first appellate court cannot be termed as a formal defect or a defect analogous to the defect contemplated by sub Rule 3(a) of Order 23 Rule 1. Order 23(3) is an exception to the general rule. All sorts of defects occuring in a suit, because of want of due diligence, cannot be permitted to be cured by having recourse to Order 23 Rule 1 (3). The impugned order passed by the first appellate court suffers from a patent illegality necessitating interference in exercise of writ jurisdiction. If the impugned order is not interfered with, the present petitioner will suffer irreparable loss, and utmost inconvenience. In the result, the writ petition deserves to be allowed.

4. At this stage, the learned counsel for the respondent submits that the respondent be permitted to file an application for amendment of the plaint as in his submission the defects as noticed by the trial

court can be cured by an amendment. It is also brought to my notice that consequent upon grant of permission to institute a fresh suit, the respondent has already filed regular civil suit No.17/07 based on the same cause of action, but after removing the defects noticed by the court in earlier plaint. Once the impugned order is quashed, the subsequently instituted suit is rendered infructuous and redundant. However, the respondent can be permitted to move appropriate application before the first appellate court seeking amendment of the plaint,which the first appellate court will decide in accordance with the law.

5. In the result, the writ petiiton is allowed. The impugned order passed by the ad-hoc District Judge, Raigad, Alibag dated 3-1-2007 is quashed and set aside. Civil Appeal no.149/05 shall stand restored to file and the first Appellate Court shall proceed to decide the appeal in accordance with the law. The respondent is granted liberty to move an amendment application. Rule made absolute in above terms with no order as to costs.

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